ESTTA Tracking number: **ESTTA622335**

Filing date: **08/19/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212477
Party	Plaintiff Balance Bar Company
Correspondence Address	R GLENN SCHROEDER SCHROEDER LAW PC 110 COOPER STREET , #605 BABYLON, NY 11702 UNITED STATES docket@schroederlawpc.com,gschroeder@schroederlawpc.com
Submission	Plaintiff's Notice of Reliance
Filer's Name	R. Glenn Schroeder
Filer's e-mail	docket@schroederlawpc.com,gschroeder@schroederlawpc.com
Signature	/r. glenn schroeder/
Date	08/19/2014
Attachments	Opposer's_Sixth_Notice_of_Reliance.pdf(3664398 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY, Opposer, v. GFA BRANDS, INC., Applicant.	:	Opposition No. 91212477

OPPOSER'S SIXTH NOTICE OF RELIANCE

Pursuant to Rule 2.122(e) of the Trademark Rules of Practice, Opposer, Balance Bar Company, hereby submits, makes of record in connection with this opposition proceeding, and notifies Applicant of its reliance upon the attached document obtained from the USPTO's TTABVUE (Trademark Trial and Appeal Board Inquiry System) system on May 26, 2014.

This document is relevant to this proceeding because, among other things, it contains admissions against interest made by Applicant with respect to the subject mark. A true and correct copy of Applicant's Trial Brief filed in Opposition Proceeding No. 91194974 is attached hereto as Exhibit F.

Respectfully submitted,

BALANCE BAR COMPANY

Dated: 19 August 2014

By: _____

R. Glenn Schroeder
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Attorney for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S SIXTH NOTICE OF RELIANCE has been served via e-mail and first-class mail this 19th day of August, 2014 upon the following:

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R. Glenn Schroeder

EXHIBIT F

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA559770**

Filing date: **09/17/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
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Signature	/s/ Johanna Wilbert
Date	09/17/2013
Attachments	Redacted GFA Brief pdf - Adobe Acrobat Pro (3).pdf(5535548 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PROMARK BRANDS INC. and H.J. HEINZ COMPANY,	**Opposition Nos. 91194974 (Parent) and Opposition No. 91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE**
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE**
Applicant.	

APPLICANT'S TRIAL BRIEF

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DESCRIPTION OF THE RECORD

The evidence of record consists of the following:[1]

I. TESTIMONIAL DEPOSITION TRANSCRIPTS

The certified transcripts of the testimonial depositions of the following witnesses:

- William E. Hooper, Senior Advisor to the Marketing Groups and Board Member of GFA Brands, taken on April 12, 2013, and filed with the Board on September 13, 2013 (including public and confidential portions), including Applicant's Exhibits 1-18 and Opposers' Exhibits 48-53;
- Philip Johnson, Chief Executive Officer of Leo J. Shapiro & Associates and GFA Brands' survey expert, taken on April 18, 2013, and filed with the Board on September 13, 2013, including Applicant's Exhibits 1-5;
- Timothy Kraft, Senior Vice-President, Associate General Counsel at GFA Brands, taken on April 26, 2013, and filed with the Board on September 13, 2013, including Applicant's Exhibits 70-76
- Leon Kaplan, President and CEO at Princeton Research and Consulting Center and GFA Brands' survey expert, taken on April 23, 2013, and filed with the Board on September 13, 2013, including Opposers' Exhibits 1-2; and
- William Shanks, Investigations Manager and Designated Lead Investigator at Marksmen, Inc., taken on April 23, 2013, and filed with the Board on September 13, 2013, including Applicant's Exhibits 6-13.

[1] A detailed index of the evidence made of record by GFA is attached as Appendix A.

II. GFA'S NOTICE OF RELIANCE

GFA's Notice of Reliance, filed April 29, 2013, including the exhibits submitted therewith, which introduced the following:

- USPTO records for Applicant's SMART BALANCE registrations (U.S. Reg. Nos. 2,200,663, 2,276,285, 2,952,127, 3,649,833, 3,747,526, 3,865,917, and 3,958,463);
- USPTO records for various third party registrations (U.S. Reg. Nos. 3,140,426, 3,945,900, 2,916,503, 2,338,871, 2,773,155, 2,686,279, 1,874,796, 3,522,138, 1,555,954, 3,420,245, 1,367,966, 4,183,609, 3,592,893, 2,107,921);
- Printouts from the website of third parties General Mills, Betty Crocker, Prego, Plum Smart, HP Hood LLC, Lightlife Foods, Orville Redenbacher, Kellogg Co., Glaceau, Smartfood, Inc., Gerber, New World Pasta Company, and Little Debbie;
- Printouts from Amazon.com and Barnesandnoble.com for third party cookbooks and other books using the term "Smart;"
- Packaging for third party products, including BISQUICK HEART SMART pancake and baking mix, PREGO HEART SMART Italian sauce, SUNSWEET PLUM SMART plum juice cocktail, HOOD SIMPLY SMART chocolate fat free milk, LIGHTLIFE SMART DELI veggie protein slices, ORVILLE REDENBACHER'S SMART POP! gourmet popping corn, KELLOGG'S SMART START cereal, GLACÉAU SMARTWATER bottled water, SMARTFOOD POPCORN popcorn, GERBER SMARTNOURISH ORGANIC baby cereal, RONZONI SMART TASTE enriched white pasta, and LITTLE DEBBIE fig bars; and

- The discovery deposition of corporate representative of Opposer, Marion Findlay, Senior Marketing Manager, conducted on January 17, 2012 and exhibits nos. 1 through 11 thereto.

III. OPPOSERS' NOTICE OF RELIANCE

Heinz's Notices of Reliance, filed March 12, 2013, including the exhibits submitted therewith, which introduced the following:

- GFA Brands, Inc.'s Response to ProMark Brands Inc.'s First Set of Interrogatories Nos. 5, 6, 7, 21, 29, 30, and 31;
- GFA Brands, Inc.'s Response to ProMark Brands Inc.'s Requests for Admission Nos. 1-136;
- Select pages from the website www.eatyourbest.com, as of March 11, 2013;
- The April 24, 2012 discovery deposition transcript and accompanying exhibits of Dr. Leon B. Kaplan, who testified as an expert witness on behalf of Applicant GFA Brands, Inc; and
- The December 18, 2012 discovery deposition transcript and accompanying exhibits of Philip Johnson, who testified as an expert witness on behalf of Applicant GFA Brands, Inc.

IV. APPLICATION FILES AND PLEADINGS

Pursuant to 37 C.F.R. § 2.122(b), the files of the trademark applications (U.S. Ser. Nos. 77/864,268 and 77/864,305) involved and the pleadings in this consolidated opposition are deemed to be of record.

OBJECTIONS TO OPPOSERS' EVIDENCE

As explained in Applicant's Response to Opposer's Evidentiary Objections, GFA Brands' only objection is a conditional motion to strike directed to testimony from Heinz's proffered survey expert, Barry Sabol, who gave about thirty pages of trial testimony listing opinions he had formed about the competing Eveready survey preformed by GFA Brands' expert Philip Johnson, which showed only 2% of the relevant consumers would be confused. Sabol had not disclosed opinions critical of the Johnson survey in a report or discovery deposition. GFA Brands' survey experts Messrs. Johnson and Kaplan responded to Sabol's previously undisclosed opinions in their trial testimony. If their testimony is stricken, as Heinz has requested, then Sabol's undisclosed opinions should then be stricken as well.

STATEMENT OF THE ISSUES

GFA Brands agrees that Heinz has accurately stated the issues.

RECITATION OF FACTS

I. GFA BRANDS, THE SMART BALANCE MARKS AND GOODS

GFA Brands and its SMART BALANCE trademark are not new to the market. Rather, GFA Brands manages multiple trademarks, multiple products, and has successfully marketed its SMART BALANCE trademark in coexistence with Heinz's SMART ONES products since at least 1996.

Bob Harris started what is now GFA Brands about seventeen years ago, when he developed a butter substitute that he sold under the SMART BALANCE trademark. (Hooper Tr. 9:16-25.) Over time, GFA Brands expanded its product line and now offers a variety of health related food products, including gluten free products under the GLUTINO trademark and natural products sold under the EARTH BALANCE trademark.

GFA Brands also expanded the goods offered under the SMART BALANCE trademark. While SMART BALANCE was first used in 1996 on butter substitutes, GFA has since sold cooking oil, milk, popcorn, peanut butter, mayonnaise, eggs, and sour cream under the SMART BALANCE mark. (Hooper Tr. 13:8-20:24; Kraft Tr. 6:4-9.) In addition to its common law rights, GFA Brands has obtained several trademark registrations for SMART BALANCE. William E. Hooper, GFA's Senior Advisor and member of the Board of Directors, authenticated the registrations for and the ownership, use, and registration status of the following SMART BALANCE marks:

- SMART BALANCE for butter substitutes, cheese, lowfat and nonfat cheese substitutes, margarine, lowfat and nonfat margarine substitutes, shortening, lowfat and nonfat shortening, snack food dips, and vegetable oils, first used as early as October 1996 (Reg. No. 2,200,663);
- SMART BALANCE for mayonnaise, lowfat and nonfat mayonnaise substitutes, mayonnaise style dressings and salad dressings, first used as early as February 1999 (Reg. No. 2,276,285);
- SMART BALANCE for popped and processed popcorn, first used as early as September 2002 (Reg. No. 2,952,127);
- SMART BALANCE for peanut butter, first used as early as 2005 (Reg. No. 3,649,833); and
- SMART BALANCE for milk, first used in 2007 (Reg. No. 3865917).

Mr. Hooper also authenticated product packaging, product pictures, and advertisements for the physical products that GFA Brands has sold in connection with these trademarks, thus establishing concurrent use of these marks with the SMART ONES marks. (Hooper Tr. 12-32, Exs. 2, 4, 6, 8, 10, 12, 14, 15, 16.)

At issue in this opposition is GFA's intent to use applications and desire to expand its SMART BALANCE product offerings to include frozen entrees and snack foods that will include the SMART BALANCE "better for you" fat profiles, which the trademark has come to symbolize. Specifically, at issue are application number 77/864,305 for SMART BALANCE in

connection with frozen appetizers primarily containing poultry, meat, seafood or vegetables; frozen entrees primarily containing poultry, meat, seafood or vegetables; frozen entrees consisting primarily of pasta or rice; and application 77/684,268 for SMART BALANCE in connection with soy chips and yucca chips; snack mixes consisting primarily of processed fruits, processed nuts, raisins and/or seeds; nut and seed-based snack bars; cake mix, frosting, cakes, frozen cakes, cookies, coffee, tea, hot chocolate, bread rolls, crackers, pretzels, corn chips, snack mixes consisting primarily of crackers, pretzels, nuts and/or popped popcorn, spices, granola-based snack bars; pita chips.

II. GFA BRANDS' SALES, ADVERTISING, AND PROMOTION OF SMART BALANCE PRODUCTS

GFA Brands and Heinz have coexisted in the market for seventeen years while using the same advertising methods, promotional channels and even selling product in the exact same stores under the SMART BALANCE and SMART ONES marks. GFA Brands sells its SMART BALANCE products nationally through three major classes of trade, conventional grocery stores, mass merchants such as Wal-Mart, and club stores such as Costco or Sam's Club. (Hooper Tr. 21:16-23.) More specifically, GFA Brands sells its SMART BALANCE products in 97% of all stores that sell groceries, including grocery store chains such as Safeway, Kroger, Publix, Wakefern, SuperValu, and Fred Meyer. (Hooper Tr. 21:24-22:7.) With respect to mass merchants, GFA Brands sells its SMART BALANCE products in Wal-Mart and Target. (Hooper Tr. 21:16-23.) These are the same grocery store chains and mass-market stores in which Heinz sells products under the SMART ONES mark. (Gray Tr. 28:17-29:2.)

Similarly, GFA Brands and Heinz have historically used the same advertising and promotional tools to reach consumers of their products are sold under the SMART BALANCE and SMART ONES marks. Specifically, GFA Brands uses all forms of mass media, including

national television, national magazines as well as websites, social media, and Facebook to reach its consumers. (Hooper Tr. 26:9-27:9.) Representative samples of the advertisements and coupons that GFA Brands has used to promote the SMART BALANCE brand were introduced during Mr. Hooper's testimony deposition as Exhibits 12, 14, 15, 16. (Hooper Tr. 25-32.) These are some of the same methods used by Heinz to market its SMART ONES brand. In fact, the SMART ONES and SMART BALANCE brands have historically coexisted in some of very same retailer promotional circulars. (Hooper Tr. Ex. 49.)

GFA Brands has committed significant financial resources to market its SMART BALANCE brand. Confidential data regarding GFA Brands' advertising expenses was introduced during Mr. Hooper's testimony deposition and is found in Confidential Exhibit 13, and the confidential testimony related thereto. (Hooper Tr. 29-36.) Specifically, GFA Brands typically spends a total of [redacted] on advertising including television, print and local advertising as well as coupons. (Hooper Tr. 34:8-20.) [redacted] (Hooper Tr. 32:9-19.)

III. THE STRENGTH OF GFA'S SMART BALANCE TRADEMARK

The advertising efforts of GFA Brands have been successful, resulting in substantial gross sales for products bearing the SMART BALANCE trademark and impressive brand awareness statistics. Confidential information regarding GFA Brands' sales was introduced during Mr. Hooper's testimony deposition and is found in Confidential Exhibit 11 and the confidential testimony related thereto. (Hooper Tr. 23.) From 2010 to 2012, GFA Brands' gross sales for products bearing SMART BALANCE ranged from [redacted] to [redacted] each year, or [redacted] for the three year period.

Confidential information regarding GFA Brands' consumer tracking and brand strength was introduced during Mr. Hooper's testimony deposition and is found in Confidential Exhibits 17 and 18, and the confidential testimony related thereto. (Hooper Tr. 36-47.) Specifically, tracking data establishes that in 2010 SMART BALANCE had a [redacted] brand awareness for its butter products, [redacted] (Hooper Tr. 41:8-16, Ex. 17.) Today, GFA Brands' SMART BALANCE marks have approximately a [redacted] brand awareness. (Hooper Tr. 41:8-19.) Additionally, [redacted] (Hooper Tr. 45:9-10.)

IV. DIFFERENCES BETWEEN THE MARKS IN SIGHT, SOUND, AND MEANING

SMART BALANCE and SMART ONES are different trademarks. The marks are different in how they appear on the page -- 12 letters vs. 9 letters. They are different in sound and different in meaning. The SMART BALANCE trademark communicates balance, specifically the right balance of great taste and good health, with a primary emphasis on heart health. (Hooper Tr. 25:5-11.) In contrast, Ms. Findlay, Heinz's corporate representative, testified that [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 68:18-69:23) [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 69:21-23.) [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 71:14-72:6.)

V. HEINZ'S CONFUSION SURVEY AND GFA BRANDS' RESPONSIVE SURVEY

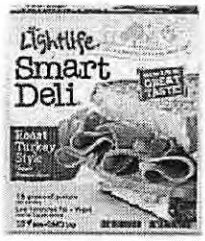
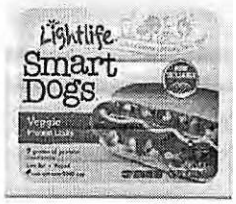
Heinz commissioned a deeply flawed survey from a purported expert, Barry Sabol. In response, GFA Brands retained Philip Johnson, a nationally known survey expert, who designed and supervised a survey following the Eveready format. Mr. Johnson's survey corrected the flaws in Sabol's survey and contradicted the Sabol survey's conclusion by proving no likelihood of confusion. GFA Brands also retained a separate survey expert, Leon Kaplan, who did not perform a survey of his own, but supplied a point-by-point critique of the Sabol survey.

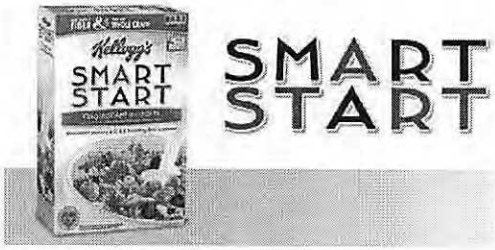
VI. THIRD PARTY USE OF SMART TRADEMARKS

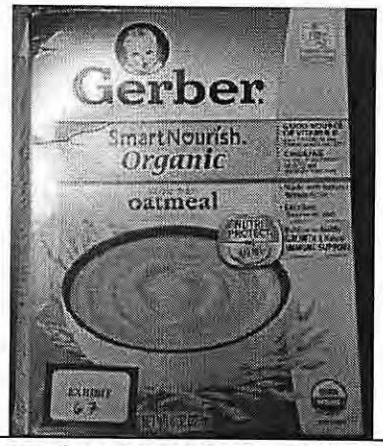
Consumers have in recent years been bombarded with SMART marks on food sold at the grocery store. In addition to GFA's use of the SMART BALANCE mark on various food products since 1996, other third party use of the term "Smart" for food and other health related goods is extensive. William Shanks, a private investigator retained by GFA Brands, testified about third party use of the SMART mark in grocery stores and authenticated documents related to the investigation preformed by his employer, Marksmen. (Shanks Tr. 8-25, Exs. 6-13). Additionally, to further substantiate the use of "Smart" in other trademarks found in grocery stores, GFA Brands has submitted packaging for various third party products, including: (1) BISQUICK HEART SMART pancake and baking mix; (2) PREGO HEART SMART Italian sauce; (3) SUNSWEET PLUM SMART plum juice cocktail; (4) HOOD SIMPLY SMART chocolate fat free milk; (5) LIGHTLIFE SMART DELI veggie protein slices; (6) ORVILLE REDENBACHER'S SMART POP! gourmet popping corn; (7) KELLOGG'S SMART START cereal; (8) GLACÉAU SMARTWATER bottled water; (9) SMARTFOOD POPCORN popcorn; (10) GERBER SMARTNOURISH ORGANIC baby cereal; (11) RONZONI SMART TASTE enriched white pasta; and (12) LITTLE DEBBIE fig bars.

Examples of third party use of "Smart" can also be found in the trademark registry as well as the websites of the owners of such registered trademarks as summarized in the following table:

Owner/Goods & Services	**Registration/Mark**	**Website**
General Mills, Inc. Baking mixes (App. Not. of Rel. at 2 and Exs. 8, 22 and 58.)	Reg. No. 3140426 BISQUICK HEART SMART	http://www.generalmills.com/en/Brands/Baking_Products/Bisquick.aspx http://www.bettycrocker.com/products/bisquick/products/bisquick_heart_smart 
CSC Brands LP Campbell Finance 2 Corp. Sauces (App. Not. of Rel. at 3 and Exs. 9, 23 and 59.)	Reg. No. 3945900 HEART Smart	http://www.prego.com/products/healthy-and-delicious/heart-smart-traditional 
Sunsweet Growers Inc. Fruit juice (App. Not. of Rel. at 3 and Exs. 10, 24 and 60.)	Reg. No. 2916503 PLUMSMART	http://www.plumsmart.net/index.html 

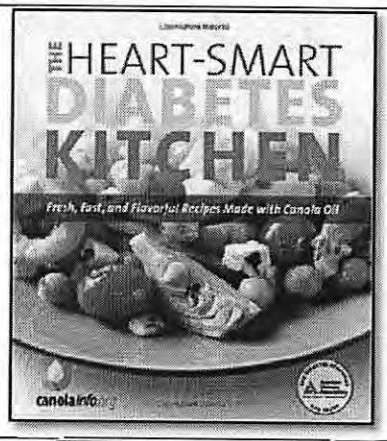
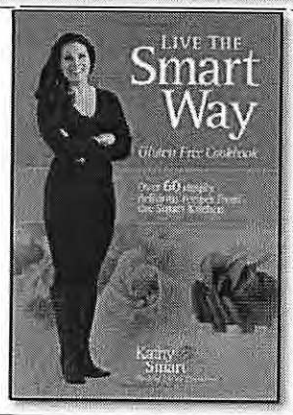
Owner/Goods & Services	Registration/Mark	Website
HP Hood LLC Dairy products, namely ultra-filtrated low-fat and fat free milk (App. Not. of Rel. at 3 and Exs. 11, 25 and 61.)	Reg. No. 2338871 SIMPLY SMART	http://www.hood.com/Products/prodListColl.aspx?id=862 
ConAgra Foods RDM, Inc. Soy based meat substitutes and soy based hot dog substitute (App. Not. of Rel. at 3 and Exs. 12, 26 and 62.)	Reg. No. 2773155 SMART DELI	http://www.lightlife.com/Vegan-Food-Vegetarian-Diet/Smart-Deli-Turkey 
ConAgra Foods RDM, Inc. Soy based hot dog substitute (App. Not. of Rel. at 3 and Exs. 13 and 27.)	Reg. No. 2686279 SMART DOGS	http://www.lightlife.com/Vegan-Food-Vegetarian-Diet/Veggie-Hot-Dogs 
Smartfoods, Inc. unpopped popcorn (App. Not. of Rel. at 3 and Exs. 14, 28 and 63.)	Reg. No. 1874796 SMART POP	http://www.orville.com/healthy-microwave-popcorn-smartpop 

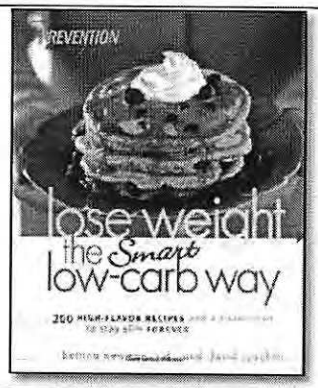
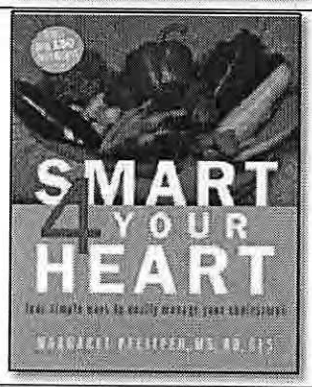
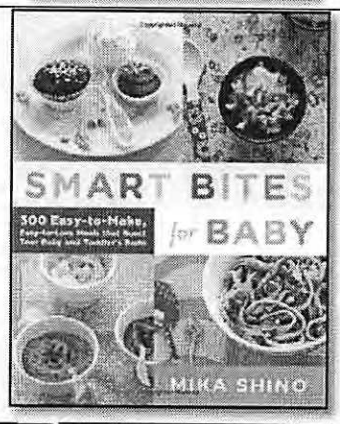
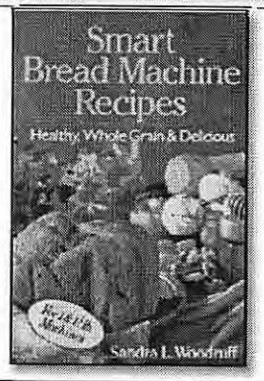
Owner/Goods & Services	Registration/Mark	Website
ConAgra Foods RDM, Inc. Soy based food products used as sausage substitutes (App. Not. of Rel. at 3 and Exs. 15, and 29.)	Reg. No. 3522138 SMART SAUSAGES	http://www.lightlife.com/Vegan-Food-Vegetarian-Diet/Smart-Sausages-Italian-Style 
Kellogg Company Corporation Cereal-derived food product to be used as breakfast food, [cereal bar], snack food or ingredient for making food (App. Not. of Rel. at 4 and Exs. 16, 30 and 64.)	Reg. No. 1555954 SMART START	http://www.kelloggs.com/en_US/SmartStart.html  **Smart Start®** Lightly sweetened, toasted multi-grain flakes and crunchy oat clusters.
Energy Brands Inc. Bottled drinking water (App. Not. of Rel. at 4 and Exs. 17, 31 and 65.)	Reg. No. 3420245 	http://www.glaceau.com/ 
Smartfoods, Inc. Popped popcorn (App. Not. of Rel. at 4 and Exs. 18, 32 and 66.)	Reg. No. 1367966 SMARTFOOD	http://www.smartfood.com  

Owner/Goods & Services	Registration/Mark	Website
Société des Produits Nestlé S.A. Blend of nutrients and minerals sold as an ingredient in food for babies; Infant Formula; Food and food substances for babies (App. Not. of Rel. at 4 and Exs. 19, 33 and 67.)	Reg. No. 4183609 SMARTNOURISH	ttp://www.gerber.com/allstages/products/puree_baby_food/2nd_foods_purees_vegetable_risotto.aspx 
New World Pasta Company Corporation Pasta (App. Not. of Rel. at 4 and Exs. 20, 34 and 68.)	Reg. No. 3592893 SMART TASTE	http://ronzonismarttaste.newworldpasta.com/pasta_story.cfm 
McKee Foods Kingman, Inc. cakes, snack cakes, cookies, [donuts, candy,] pies, [pastries, rolls, crackers, buns] and other bakery goods (excluding bread); [breakfast cereal, ready to eat cereal derived food bars; granola and granola bars] (App. Not. of Rel. at 4 and Exs. 21, 35 and 69.)	Reg. No. 2107921 SNACK SMART	http://www.littledebbie.com/products/bars.asp 

The use of the term "Smart" in commerce on many of the above-identified products was also confirmed by the testimony of Mr. Tim Kraft, who authenticated pictures of third party packaging and discussed purchasing or seeing various "Smart" products during his own shopping experiences, including SMART POP popcorn, SMART START cereal, SIMPLY SMART milk, and HEARTSMART BISQUICK pancake mix. (Kraft Tr. 9:15-13:17, Exs. 70-75.)

In addition to use on food products, authors and publishers extensively use the term "Smart" in connection with diet and health related cookbooks. Examples of such use include the following:

Book	Cover
American Diabetes Association and CanolaInfo, *The Heart-Smart Diabetes Kitchen: Fresh, Fast, and Flavorful Recipes Made with Canola Oil*, 2009, http://www.amazon.com/Heart-Smart-Diabetes-Kitchen-Flavorful-Recipes/dp/158040331X/ref=sr_1_24?s=books&ie=UTF8&qid=1364934746&sr=1-24 (accessed and printed on April 15, 2013) (App. Not. of Rel. at 6 and Ex. 36.)	
Kathy Smart, *Live the Smart Way: Gluten Free Cookbook*, 2011, http://www.amazon.com/Live-Smart-Way-Gluten-Cookbook/dp/0987700308/ref=sr_1_45?s=books&ie=UTF8&qid=1364934872&sr=1-45 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 6 and Ex. 37.)	

Book	Cover
Bettina Newman R.D., *Lose Weight the Smart Low-Carb Way: 200 High-Flavor Recipes and a 7-Step Plan to Stay Slim Forever (Prevention Health Cooking)*, 2002, http://www.amazon.com/Lose-Weight-Smart-Low-Carb-Way/dp/B003D7JXIC/ref=sr_1_66?s=books&ie=UTF8&qid=1364935099&sr=1-66 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 6-7 and Ex. 38.)	
Margaret Pfeiffer, *Smart 4 Your Heart Four Simple Ways To Easily Manage Your Cholesterol*, 2009, http://www.amazon.com/Smart-simple-easily-manage-cholesterol/dp/0979962625/ref=sr_1_84?s=books&ie=UTF8&qid=1364935190&sr=1-84 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 7 and Ex. 39.)	
Mika Shino, *Smart Bites for Baby: 300 Easy-to-Make, Easy-to-Love Meals that Boost Your Baby and Toddler's Brain*, 2012, http://www.amazon.com/Smart-Bites-Easy---Make--Love/dp/0738215554/ref=sr_1_4?s=books&ie=UTF8&qid=1364934424&sr=1-4 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 7 and Ex. 40.)	
Sandra Woodruff, *Smart Bread Machine Recipes: Healthy, Whole Grain & Delicious*, 1994, http://www.amazon.com/Smart-Bread-Machine-Recipes-Delicious/dp/0806906901/ref=sr_1_11?s=books&ie=UTF8&qid=1364934424&sr=1-11 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 7 and Ex. 41.)	

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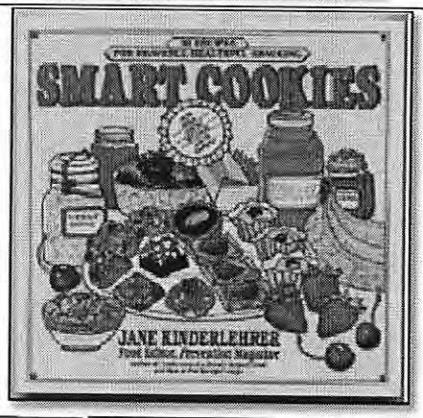
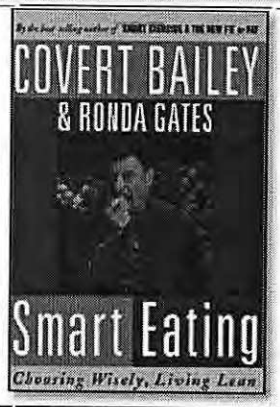
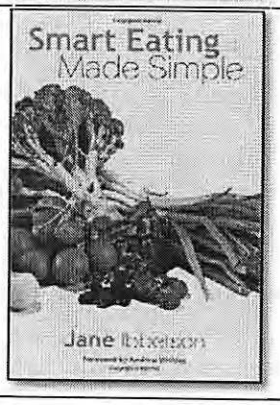
Jane Kinderlehrer, *Smart Cookies: 80 Recipes for Heavenly, Healthful Snacking*, 1985, http://www.amazon.com/Smart-Cookies-Heavenly-Healthful-Snacking/dp/0937858625/ref=sr_1_101?s=books&ie=UTF8&qid=1364935587&sr=1-101 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 8 and Ex. 43.)	
Covert Bailey and Ronda Gates, *Smart Eating: Choosing Wisely, Living Lean*, 1996, http://www.amazon.com/Smart-Eating-Choosing-Wisely-Living/dp/039585492X/ref=sr_1_14?s=books&ie=UTF8&qid=1364934424&sr=1-14 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 8 and Ex. 44.)	
Jane Ibbetson, *Smart Eating Made Simple*, 2012, http://www.amazon.com/Smart-Eating-Made-Simple-Ibbetson/dp/1468566598/ref=sr_1_49?s=books&ie=UTF8&qid=1364934966&sr=1-49 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 8 and Ex. 45.)	

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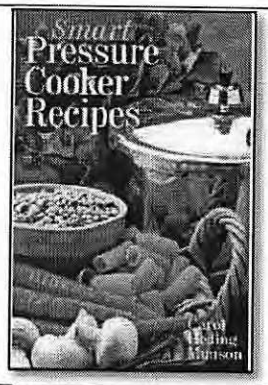
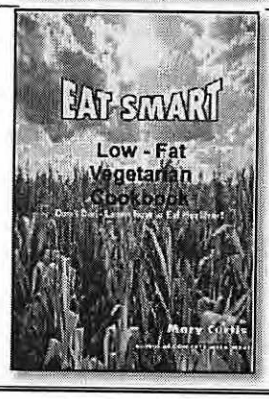
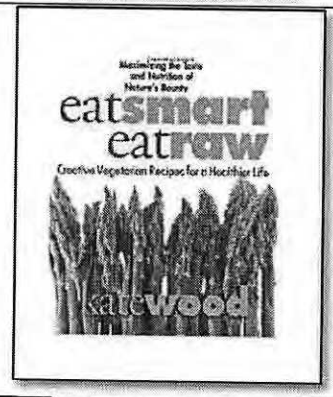
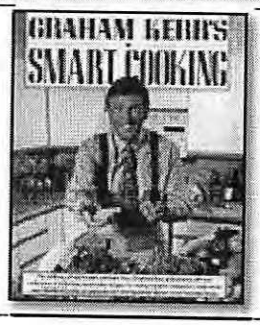
Carol Heading Munson, *Smart Pressure Cooker Recipes*, 1998, http://www.amazon.com/Pressure-Cooker-Recipes-Heading-Munson/dp/0806999853/ref=sr_1_40?s=books&ie=UTF8&qid=1364935432&sr=1-40 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 8-9 and Ex. 46.)	
Mary Curtis, *Eat Smart: Low - Fat Vegetarian CookBook*, 2007, http://www.barnesandnoble.com/w/eat-smart-mrs-mary-curtis/1112402492?ean=9781257681631&itm=1&usri=9781257681631 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 9 and Ex. 47.)	
Kate Wood, *Eat Smart, Eat Raw: Creative Vegetarian Recipes for a Healthier Life*, 2006, http://www.barnesandnoble.com/w/eat-smart-eat-raw-kate-wood/1113943087?ean=9780757002618&itm=1&usri=9780757002618 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 9 and Ex. 48.)	
Graham Kerr, *Graham Kerr's Smart Cooking*, 1991, http://www.barnesandnoble.com/w/graham-kerrs-smart-cooking-graham-kerr/1000078238?ean=9780385420747&itm=1&usri=9780385420747 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 9 and Ex. 49.)	

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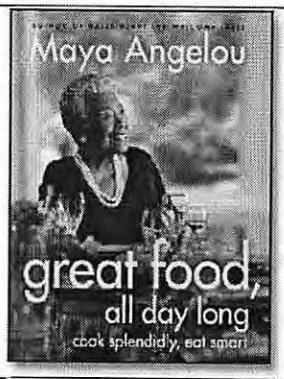
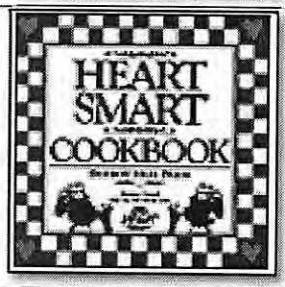
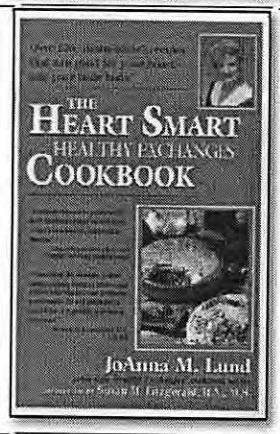
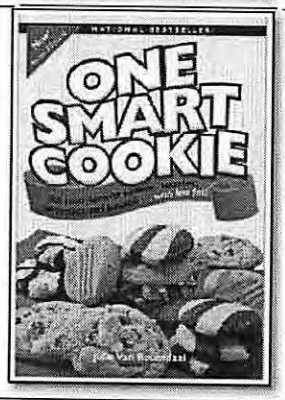
Maya Angelou, *Great Food, All Day Long: Cook Splendidly, Eat Smart*, 2010, http://www.barnesandnoble.com/w/great-food-all-day-long-maya-angelou/1100300048?ean=9780679604372&itm=1&usri=9780679604372 (accessed and printed on April 16, 2013) (App. Not. of Rel. at 9-10 and Ex. 50.)	
Henry Ford and Heart and Vascular Inst. Staff, *Heart Smart Cookbook*, 1994, http://www.barnesandnoble.com/w/heart-smart-cookbook-henry-ford/1015887423?ean=9780836280593&itm=1&usri=9780836280593 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 10 and Ex. 51.)	
JoAnna M. Lund, *The Heart Smart Healthy Exchanges Cookbook*, 1999, http://www.barnesandnoble.com/w/heart-smart-healthy-exchanges-cookbook-joanna-m-lund/1100170456?ean=9780399524745&itm=1&usri=9780399524745 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 10 and Ex. 52.)	
Julie Van Rosendaal, *One Smart Cookie: All Your Favorite Cookies, Squares, Brownies and Biscotti...With Less Fat*, 2007, http://www.barnesandnoble.com/w/one-smart-cookie-julie-van-rosendaal/1101996996?ean=9781552859124&itm=1&usri=9781552859124 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 10 and Ex. 53.)	

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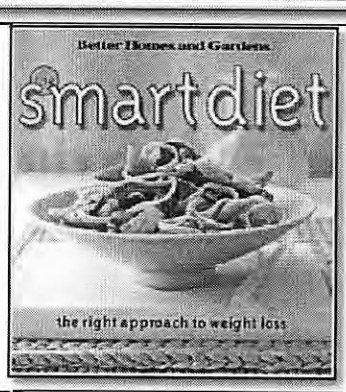
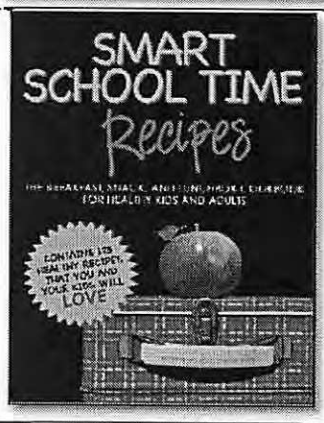
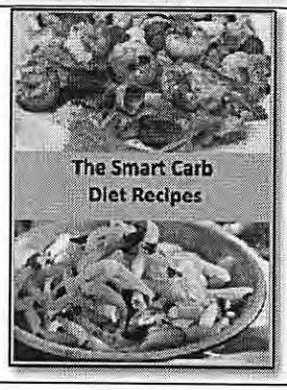
Better Homes & Gardens, *Smart Diet*, 2000, http://www.barnesandnoble.com/w/smart-diet-better-homes-gardens/1008404626?ean=9780696211737&itm=1&usri=9780696211737 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 11 and Ex. 55.)	
Alisa Fleming, *SMART SCHOOL TIME RECIPES: The Breakfast, Snack, and Lunchbox Cookbook for Healthy Kids and Adults*, 2010, http://www.barnesandnoble.com/w/smart-school-time-recipes-alisa-fleming/1026901529?ean=9780979128639&itm=1&usri=9780979128639 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 11 and Ex. 56.)	
Andrew Rainier, *The Smart Carb Diet Recipes*, 2012, http://www.barnesandnoble.com/w/the-smart-carb-diet-recipes-andrew-rainier/1111647528?ean=9781105775802&itm=1&usri=9781105775802 (accessed and printed on April 17, 2013) (App. Not. of Rel. at 11 and Ex. 57.)	

VII. LACK OF CONFUSION WITH OTHER SMART MARKS

Despite coexisting in the market place since 1996, there has been no customer confusion between the SMART ONES products and the SMART BALANCE products, a fact that was repeatedly confirmed by Heinz's own witnesses. (Hudson Tr. 92:18-22; Gray Tr. 76:10-16.) GFA Brands' witnesses were also unaware of any instances of actual confusion between SMART ONES and SMART BALANCE despite nearly 17 years of coexistence in the market. (Kraft Tr. 14:22-15:1; Hooper Tr. 13:3-7, 13:17-22, 16:1-5, 18:6-10, 18:25-19:4, 20:25-21:12.) Similarly, despite or perhaps because of the extensive use of the term "Smart" on other food products, Heinz's witnesses were unaware of any actual confusion between products bearing a SMART ONES trademark and any other products bearing any SMART mark. (Gray Tr. 76:17-77:6; Hudson Tr. 94:5-96:10.)

ARGUMENT

I. GFA IS ENTITLED TO REGISTER THE SMART BALANCE MARKS BECAUSE THERE IS NO LIKELIHOOD OF CONFUSION.

A. Heinz has not met its burden under the DuPont factors.

Heinz has not met its burden of proving that there is a likelihood of confusion. West Fla. Seafood v. Jet Rests. Inc., 31 F.3d 1122, 1125, 31 U.S.P.Q.2d 1660, 1662 (Fed. Cir. 1994)(opposer must prove likelihood of confusion by a preponderance of the evidence). Heinz must prove that there is a likelihood of confusion, not just possible confusion, and it has not done so. Witco Chem. Co. v. Whitefield Chem. Co., 418 F.2d 1403, 1405, 164 U.S.P.Q. 43, 44-45 (C.C.P.A. 1969).

To assess likelihood of confusion, the Board considers the thirteen DuPont factors. In re E.I. DuPont De Nemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Of those factors, the following are particularly relevant to this proceeding: Factor 1 – similarity or

dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression; Factor 4 – conditions under which, and the buyers to whom, sales are made, i.e., "impulse" vs. careful, sophisticated purchasing; Factor 6 – the number and nature of similar marks in use on similar goods; Factor 7 – the nature and extent of any actual confusion; and Factor 8 – the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

As explained below, and contrary to Heinz's assertions, an evaluation of the DuPont factors proves that confusion is unlikely to occur. Because Heinz has not offered persuasive evidence to the contrary, let alone a preponderance of the evidence, this Proceeding should be dismissed. GFA Brands' applications should be granted.

B. Factor 1: The marks are dissimilar.

Allowing GFA to register SMART BALANCE for frozen meals will not cause a likelihood of confusion because the term "balance" is different than the term "ones," creating an overall difference between the SMART BALANCE and SMART ONES trademarks when the marks are viewed as a whole. As the Federal Circuit explained, "one DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." Champagne Louis Roederer, S.A. v. Delicato Vineyards, 148 F.3d 1373, 1375, 47 U.S.P.Q.2d 1459, 1460-61 (Fed. Cir. 1998) (affirming dismissal of opposition based on dissimilarity of CRISTAL and CRYSTAL CREEK). The dissimilarity between the marks here is an appropriate factor upon which to rule in GFA Brands' favor.

Pursuant to the "anti-dissection rule," the parties' marks must be compared as a whole, rather than by their component parts. Frank Mint Corp. v. Master Mfg. Co., 667 F.2d 1005, 1007, 212 U.S.P.Q. 233, 234 (Fed. Cir. 1981). Because a mark must be considered as a whole, the mere fact that marks share elements, even dominant elements, does not compel a conclusion

of likely confusion. General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987) ("[t]he use of identical, even dominant, words in common does not automatically mean that the two marks are similar."). In fact, the TTAB and the Federal Circuit have repeatedly held there is no likelihood of confusion between marks that share a common first element when the marks as a whole are dissimilar:

- LEAN LIVING allowed to register over LEAN CUISINE in Stouffer Corp. v. Health Valley Natural Foods Inc., 1 U.S.P.Q.2d 1900 (T.T.A.B. 1986);
- QUICK 'N CRISPY allowed over QUICK 'N BUTTERY and QUICK 'N SAUCY in United Foods Inc. v. J.R. Simplot Co., 4 U.S.P.Q.2d 1172 (T.T.A.B. 1987);
- RED RAVE allowed over RED BULL in Red Bull Gmbh v. Cochran, Opposition No. 91152588, 2004 WL 2368486 (T.T.A.B. 2004); and
- SPICE ISLAND allowed over SPICE GARDEN in Burns Philp Food Inc. v. Modern Prods., Inc., 24 U.S.P.Q.2d 1157 (T.T.A.B. 1992).

Thus, while both the Heinz and GFA Brands marks contain the term "Smart," the inquiry about the similarity of the marks cannot end there. The additional terms BALANCE and ONES that comprise the marks have trademark and market significance, resulting in two marks that, when taken as a whole, have different appearances, sounds, connotations, and commercial impressions. See Shen Mfg. Co. v. Ritz Hotel, Ltd., 393 F.3d 1238, 1245, 73 U.S.P.Q.2d 1350, 1356-57 (Fed. Cir. 2004).

Furthermore, that the term "Smart" is both laudatory and extensively used by third parties means that the term is weak and must be given less weight in the trademark analysis. It has been repeatedly held that laudatory terms are descriptive or highly suggestive. TMEP §1209.03(k) ("Laudatory terms, those that attribute quality or excellence to goods or services, are

merely descriptive under §2(e)(1)."). Thus, if a highly laudatory term is used, the user cannot complain of the use by another of a laudatory expression of similar connotation. Heyer, Inc. v. Popper & Sons, Inc., 152 U.S.P.Q. 196 (T.T.A.B. 1966).

Heinz has admitted that "Smart" as used in SMART ONES is a laudatory or complimentary term. Specifically, Ms. Findlay, Heinz's Senior Marketing Manager, [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 68:18-21.)

Any significance of the shared term "Smart" is minimal for the additional reason that "Smart" has been both used and registered by many third parties as an element of a larger trademark in the consumer packaged goods industry. (App. Not. of Rel. Exs. 8-35 & 58-69.) As a result, the term "Smart" as one element of a trademark is not truly distinctive or source signifying. The common use of the term certainly can form no rational basis for contending that the marks as a whole are likely to be viewed as closely similar or as coming from the same or a related source. See In re Broadway Chicken, Inc., 38 U.S.P.Q.2d 1559, 1565-66 (T.T.A.B. 1996) ("Evidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field"); See also In re Bed & Breakfast Registry, 791 F.2d 157, 159, 229 U.S.P.Q. 818, 819 (Fed. Cir. 1989) ("The record shows that a large number of marks embodying the words 'bed and breakfast' are used for similar reservation services, a factor that weighs in favor of the conclusion that BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL are not rendered confusingly similar merely because they share the words 'bed and breakfast.'").

Finally, the marks at issue are distinct because they provide consumers with a different impression or connotation. When two conflicting marks each have an aura of suggestion, but each suggests something different, this tends to indicate a lack of confusion. For example, the Federal Circuit explained that despite the undisputed similarity of two COACH marks, the marks had different meanings and created distinct commercial impressions -- one in reference to luggage and a stage coach and the other in the context of an educational coach or tutor. Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1369, 101 U.S.P.Q.2d 1713, 1721-22 (Fed. Cir. 2012).

As with the COACH example, SMART ONES and SMART BALANCE have different meanings and create distinct commercial impressions, which minimize the likelihood of confusion. Heinz's own corporate designee agrees with this analysis. For example, Ms. Findlay [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 68:22-24.) [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 71:14-19.) [redacted] He testified that the SMART BALANCE trademark is positioned to communicate "the balance, the appropriate, right balance of great taste and good health, with primary emphasis on heart health." (Hooper Tr. 25:5-11.)

Thus, given the difference in sound, look, and connotation, the overall commercial impressions of SMART BALANCE and SMART ONES are markedly different.

C. Factor 4: Customers for these products exercise considerable care.

The TTAB and the courts have recognized that calorie-conscious customers are not impulse purchasers. Thus, Heinz's argument regarding the degree of care has explicitly been rejected by the TTAB and contradicted by Heinz's own witness. Specifically, when the TTAB

previously evaluated frozen prepared entrees in the context of an opposition involving the marks LEAN CUISINE and LEAN LIVING, it rejected the argument Heinz advances and instead held that although frozen entrees are generally inexpensive, because they are targeted to calorie-conscious consumers and are not generic food products, they are not purchased on impulse. Stouffer Corp., 1 U.S.P.Q.2d at 1902. As the TTAB explained, "even in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its calorie content." Id. The Eighth Circuit adopted this same analysis of sophistication among frozen entree purchasers when it affirmed the judgment of no infringement and no dilution between LEAN N' TASTY and LEAN CUISINE. Luigino's, Inc. v. Stouffer Corp., 170 F.3d 827, 831-32, 50 U.S.P.Q.2d 1047, 1050 (8th Cir. 1999).

Heinz's own witnesses confirmed that its products are targeted to health conscious customers and that such customers are not making impulse purchases, directly contradicting the arguments Heinz's lawyers make in their brief. Specifically, Ms. Marion Findlay, Heinz's corporate representative at Heinz's Rule 30(b)(6) discovery deposition, [redacted] (App. Not. of Rel. Conf. Ex. 70, Findlay Dep. 53:11-24.) Similarly, Heinz's in-house counsel, Ms. Sabrina Hudson, confirmed that products sold under the SMART ONES marks were in the "frozen nutritional category," which she described as a category of "mostly meals that are somehow better for you." (Hudson Tr. 12:21-13:8.) Ms. Hudson went on to explain that these products could be better for you because "they are portion control or they have lower calories,

lower fat, probably as a result maybe lower in what people consider nutritionals that are not necessarily good for you but have nutritionals that are better for you, whole grains and things like that." (Hudson Tr. 13:1-8.) Customers would understandably take time to read the product label to identify the relevant "better for you" characteristics and make sure they are purchasing the correct product for their health needs, [redacted]. It follows that the fourth DuPont factor favors GFA Brands.

D. Factor 6 –Third party use of the term "Smart" in the consumer packaged goods industry precludes "Smart" from having source indicating significance or trademark strength.

Factor 6, the number and nature of similar marks in use on similar goods, strongly favors GFA Brands. In today's market, "Smart" is a laudatory term used on a wide variety of products ranging from smart cars, to smart phones, to smart water. In the food industry, the term "Smart" has been commonly used to convey a healthy product and to attract consumers looking for "better-for-you" foods. Many products sold in the same grocery stores as SMART ONES branded products use the term "Smart" to suggest healthy food. GFA Brands has introduced evidence of at least 14 other such products in addition to products sold under the SMART BALANCE mark using "Smart," as summarized in the fact section VI above.

Additionally, the word "Smart" is in printed publications discussing "Smart" food decisions, and is a term that is widely registered by third parties for food products. GFA Brands has introduced evidence of at least 22 such publications. A review of these book titles demonstrates that the authors used the word "Smart" in their titles to convey that the books are about diet and nutrition, eat healthy, or eating "Smart." (App. Not. of Rel. Exs. 36-57.))

That the SMART ONES mark has coexisted with so many products sold in some of the very same stores proves that Heinz's rights are narrowly defined and strongly suggests that expanding the products offered under the SMART BALANCE trademark is not likely to lead to

confusion. See In re Hartz Hotel Servs. Inc., 102 U.S.P.Q.2d 1150, 1153-55 (T.T.A.B. 2012). (recognizing the extensive third party use of GRAND HOTEL and allowing the registration of GRAND HOTELS NYC over prior registration for the mark GRAND HOTEL).

In a similar case involving extensive third-party use, where the Board evaluated the registration of NATURE'S PLUS for vitamins, the applicant introduced evidenced of fifteen third-party registrations for marks containing the term PLUS. Plus Prods. v. Natural Organics, Inc., 204 U.S.P.Q. 773 (T.T.A.B. 1979). The Board drew the following inferences from the co-existence of these registrations: (1) The Trademark Office has historically registered PLUS marks for vitamins to different parties so long as there has been some difference, not necessarily created by a distinctive word, between the marks as a whole, e.g. VITAMINS PLUS and IRON PLUS; (2) a number of different trademark owners have believed, over a long interval of time, that various PLUS marks can be used and registered side-by-side without causing confusion provided there are minimal differences between the marks. Id. at 779. The rationale of these inferences is further confirmed by prior decisions addressing third party use explaining that third-party registrations "reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various 'STAR' marks can coexist provided that there is a difference." Jerrold Elecs. Corp. v. The Magnavox Co., 199 U.S.P.Q. 751, 758 (T.T.A.B. 1978).

The use by numerous third parties in a market desensitizes consumers to the use of the term by reducing the individual distinctiveness of similar marks and making confusion unlikely. See General Mills, Inc. v. Health Valley Foods, 24 U.S.P.Q.2d 1270, 1277 (T.T.A.B. 1992). Thus, when evaluating breakfast cereals high in fiber, there was no likely confusion between FIBER ONE and FIBER 7 FLAKES due in part fact that the field of "FIBER" composite marks

for food was crowded, allowing consumers to distinguish between the other composite portions of the marks. Id.

Heinz cannot minimize the impact of this extensive third-party use. (Opp. Br. at 31.) Third-party registrations and printed publications are admissible to demonstrate how a mark is used in ordinary parlance. Institut Nat'l Des Appellations D'Origine v. Vintners Int'l Co., 958 F.2d 1574, 1582, 22 U.S.P.Q.2d 1190, 1196 (Fed. Cir. 1992). Moreover, when third party registrations are used to show a mark is descriptive, it is irrelevant whether the marks are in current use. See Spraying Sys. Co. v. Delevan, Inc., 762 F. Supp. 772, 778, 19 U.S.P.Q.2d 1121, 1125 (N. D. Ill. 1991). As noted above, registrations are widely recognized as evidence that the Trademark Office, by registering multiple marks with a common term, believed that the identical portions of the composite marks were weak and not likely to cause confusion. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2013) (hereinafter "MCCARTHY"); Rocket Trademarks Pty Ltd. v. Phard S.p.A., 98 U.S.P.Q.2d 1066, 1075 (T.T.A.B. 2011) (no confusion was likely between senior ELEMENT and junior ZU ELEMENTS for apparel because third party registrations evidenced that "element" was suggestive of clothing).

Heinz's claim that confusion is likely given its exclusive use of the SMART mark for frozen meals is based on an arbitrary distinction when one considers that many competitive food products are sold using the SMART mark. For example, Heinz sells frozen desserts under the SMART ONES mark, while Bryers sells BREYERS CARB SMART ice cream bar, yet no confusion has resulted. (Hudson Tr. 94:21-95:11, Ex. 6.) The argument that SMART ONES is the only "frozen food" to have a federal trademark registration for a similar mark (Opp. Br. at

32) is wrong and meaningless when one considers Bryers's actual use of the CARB SMART mark.

Similarly, Heinz sells breakfast items under the SMART ONES trademark that contain eggs. (Hudson Tr. 92:10-17.) GFA Brands has sold eggs in connection with its SMART BALANCE mark. (Kraft Tr. 6:4-9.) Logically, a consumer seeking breakfast items may consider purchasing refrigerated eggs as well as frozen prepared eggs. That SMART ONES eggs are located in the refrigerated section while SMART ONES breakfast items are located in the frozen section is an arbitrary distinction that would be unlikely to prevent confusion if the term "Smart" were actually unique for goods in the breakfast category. In reality, it is not unique. In fact, Kellogg has been using the SMART START mark for breakfast cereal since 1988, well before SMART ONES entered the breakfast market. (App. Not. of Rel. Ex. 16.)

Here, the many third-party registrations incorporating the term "Smart" as well as the evidence of use of the term in commerce and in diet and health related books leads consumers to understand the inference that the term "Smart" has not been exclusively appropriated by any one entity in the field, and that customers distinguish between these marks when other terms are used. In re Hartz Hotel Servs., Inc., 102 U.S.P.Q.2d at 1153-55. Thus, as a result of the addition of the terms BALANCE and ONES, the marks when taken as a whole are unlikely to lead to confusion.

E. Factors 7 and 8: There is no evidence of actual confusion.

Factors 7 and 8, the nature and extent of actual confusion and the length of time during and conditions under which there has been concurrent use without confusion, strongly favor GFA Brands and favor a finding that confusion is not likely. GFA Brands began using its SMART BALANCE mark in 1996. (Hooper Tr. 11:17-19.) Heinz began using its SMART ONES mark in 1992. In about seventeen years of co-existence there have been no reported

instances of actual confusion. (Gray Tr. 76:10-16.) In fact, there have been no reported instances of actual confusion between SMART ONES and any other SMART mark in the grocery store. (Gray Tr. 76:17-77:6.)

Where, as here, the parties' marks have coexisted in the market for many years, the absence of a single instance of actual confusion strongly indicates that confusion is unlikely. King Candy Co. v. Eunice King's Kitchen, Inc., 182 U.S.P.Q. 108, 110 (C.C.P.A. 1974) (absence of confusion for over twenty years supports a finding that confusion is not likely); G.H. Mumm & Cie v. Desnoes & Geddes, Ltd., 16 U.S.P.Q.2d 1635, 1638 (Fed. Cir. 1990) (affirming dismissal of opposition and noting despite over a decade of marketing in the United States, opposer was unable to offer any evidence of actual confusion); Mr. Hero Sandwich Sys., Inc. v. Roman Meal Co., 228 U.S.P.Q. 364, 367 (Fed. Cir. 1989) (concurrent use of the marks for approximately twenty years with no reported instances of confusion suggests that the marks are not likely to cause confusion). By spending tens of millions of dollars in advertising the SMART BALANCE mark, if GFA Brands' presence in the grocery store was likely to cause confusion, confusion likely would have manifested at some point in the past fifteen years. That it has not strongly favors a finding that confusion is unlikely to occur as GFA Brands further expands the product line sold under the SMART BALANCE mark.

F. Factor 13: Other Probative Facts – GFA's Enforcement Strategy

Heinz's claim that GFA has "essentially admitted" confusion and dilution is a gross mischaracterization of GFA's former enforcement policy, which has no probative value in this proceeding. (Opp. Br. at 34.) Seventeen years ago when GFA was a new company with a new mark, GFA was concerned about the possibility of confusion with other marks using the term "Smart." (Kraft Tr. 9:4-10.) As GFA better understood the market place and realized that confusion is unlikely, its enforcement strategy has changed dramatically. In the words of GFA's

in-house counsel, Mr. Kraft, GFA's enforcement strategy "has had to evolve" because of the "rampant proliferation of the use of 'Smart' marks" in the marketplace. (Kraft Tr. 9:1:3.) GFA's current internal enforcement guidelines suggest enforcement against marks for similar categories of goods in which the term "Smart" is coupled with a word that begins with "B," such as "SMART BLEND." (Kraft Tr. 7:4-22.) Rather than being "essentially an admission" that registration of the SMART BALANCE for frozen foods would confuse purchases and dilute the SMART ONES mark, the change in GFA's enforcement strategy is evidence that the SMART portion of the SMART ONES mark has become a weak, descriptive term for healthy eating choices.

Further, the Board has previously recognized the limited value of a party's early enforcement strategies have explaining that it would be merely "one fact to be considered together with all of the other facts of record." Domino's Pizza Inc. v. Little Caesar Enters., Inc., 7 U.S.P.Q.2d 1359, 1988 WL 252360 at *6 (T.T.A.B. 1988). In this case, the change in GFA's enforcement position was a thoughtful response to the changing status of the term "Smart" in the marketplace, which has rendered that portion of the SMART ONES mark weak and descriptive.

II. THE SURVEY EVIDENCE PROVES THERE IS NO LIKELIHOOD OF CONFUSION.

A. The Importance of Properly Conducted Confusion Surveys.

A consumer survey can provide important evidence about whether confusion is likely. The advantage of a survey over analyzing the DuPont factors one-by-one is that a proper survey tests the combined effect of the of DuPont factors from the perspective of the relevant consuming public, which is the key to determining likelihood of confusion. See McCARTHY, supra at § 32:158 (consumer surveys are important because trademark disputes "turn largely on factual issues of customer perception").

Consumer survey evidence is useful, however, only if the survey is done in accordance with generally accepted standards. Those standards are set forth in recognized authoritative works, including MCCARTHY and SHARI DIAMOND, "Reference Guide on Survey Research," REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000) (hereinafter "DIAMOND"). See also MANUAL FOR COMPLEX LITIGATION (4th) p. 103 (2004).

The survey evidence developed by Barry Sabol, upon which Heinz relies, fails nearly every one of the standards for survey admissibility. Sabol's survey should be given little if any weight. On the other hand, the survey performed by GFA's Brands' survey expert, Philip Johnson, the CEO of Leo J. Shapiro & Associates, followed the standard Eveready format, which the Board and courts have repeatedly held to be reliable. See Starbucks U.S. Brands, LLC v. Ruben, 780 U.S.P.Q.2d 1741, 1753 (T.T.A.B. 2006) ("[G]iven the way in which this survey carefully follows the Ever-Ready likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein."). Mr. Johnson's survey shows no likelihood of confusion and should be given considerable weight. The Johnson survey confirms that the proliferation of SMART marks, the difference in the marks as a whole, and the care exercised by consumers when purchasing the goods in question leads to there being no likelihood of confusion.

B. Was the Survey Conducted by an Appropriately Skilled and Experience Survey Expert? No for Heinz; Yes for GFA Brands.

An important factor in assessing the validity of a survey is whether the expert who designed and implemented the survey was appropriately experienced. See DIAMOND, supra at 375. A survey should be conducted by an expert "who demonstrates an understanding of the foundational, current and best practices in survey methodology, including sampling, instrument design (questionnaire and interview construction), and statistical analysis." Id. Heinz's survey

expert, Barry Sabol, does not satisfy this requirement. (Kaplan Tr. 55:14-57:19.) Sabol has a stunning lack of experience with confusion surveys used in litigation. He admitted he has never read any portion of the leading treatise on trademark law, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, which includes a lengthy discussion of survey evidence. (Sabol Tr. 101:18-20.) Nor could he recall reading any of Professor Shari Diamond's writings on the standards for admissibility of survey evidence in litigation. (Sabol Tr. 101:1-103:4.)

Sabol does not even know what an Eveready survey is. (Sabol Tr. 101:8-13.) As MCCARTHY explains, the Eveready format is the "standard survey format" for confusion cases such as this. MCCARTHY, supra at § 32:174. Although he spent about 30 pages of his trial testimony attacking Johnson's Eveready survey, Sabol had not even tried to familiarize himself with the benefits or elements of such a survey. Sabol's total lack of experience with Eveready surveys and the leading authoritative works on surveys is reflected in his criticism of this standard format and in the many ways his own survey deviates from accepted practice.

GFA Brands, by comparison, retained Philip Johnson, a nationally known authority on consumer surveys generally and litigation surveys in particular. Given his long experience in this area, Johnson -- unlike Sabol -- has been reading MCCARTHY and Dr. Diamond's writings about surveys since they were first published many years ago. (Johnson Tr. 12:5-20.) Mr. Johnson has testified in evidentiary hearings, trials, or TTAB trial proceedings about 80 times, with more than half focusing on the issue of likelihood of confusion. (Johnson Tr. 12:20-13:7.) He has never been excluded as an expert on survey research methodologies, and none of the surveys he has performed have been excluded from evidence. (Johnson Tr. 12:21-13:15.)

C. Was the Survey Universe Properly Chosen and Defined? No for Heinz, Yes for GFA Brands.

The first step in designing a survey is to determine the population or "universe" to be studied. MCCARTHY, supra at § 32:159. Selecting the universe is important because even if proper questions are asked in a proper manner, if the wrong people are asked, the results are likely to be irrelevant.

A fundamental error in Sabol's survey is that he excluded a large group of respondents whose states of mind are relevant to the issue of confusion, namely potential purchasers of the junior user's products who were not aware of the senior user's mark. See MCCARTHY, supra at § 32:161. Through screening questions, Sabol excluded respondents who, by his own admission, were less likely to be confused, with the result of increasing the percent of confusion his survey allegedly represents.

To qualify as a respondent, Sabol required a "yes" answer to a question asking whether they had personally purchased any frozen meals in the past 30 days **and** "yes" to a question about whether they had ever heard of Heinz's SMART ONES brand products. The first question is problematic in itself. (Kaplan Tr. 27:5-29:1.) But the second screening question, requiring previous knowledge of the SMART ONES brand, caused Sabol's universe to be blatantly under inclusive and improper. As explained in MCCARTHY, in a traditional case of forward confusion, such as alleged here, "the proper universe to survey is composed of the potential buyers of the junior user's goods or services, not the senior user's customers." § 32:159 (emphasis in original.) Making awareness of the SMART ONES brand a part of the definition of Sabol's universe is wrong because it excludes a segment of the relevant market for GFA Brands' products, namely potential purchasers who are not aware of the SMART ONES brand.

Sabol's under inclusive universe was intentional, and it skewed his results toward confusion. Sabol's testimony reflects that it was a purposeful attempt on his part to increase the number of respondents "who might be confused by the introduction of Smart Balance ...." (Sabol Tr. 20:3-20; see Kaplan Tr. 29:3-25.)

Mr. Johnson's survey, on the other hand, did not limit the universe to those potential buyers who were aware of the Smart Ones brand. See McCARTHY, supra at § 32:159. (Johnson Tr. 22:23-27:6.) Although there are many other flaws with Sabol's survey, the results of Johnson's survey of a properly defined universe shows only 2% indicated any possibility of confusion. This de minimus result proves there is no likelihood of confusion among the relevant consumers. (Johnson Tr. 55:2-57:5.) Sabol's incorrect universe, therefore, is not simply a harmless error. It is a flaw that contributed to the widely divergent results of the two surveys at issue.

D. Were the Survey Questions Clear and Not Leading? No for Heinz; Yes for GFA Brands.

Although there are several problems with the format of the questions in Sabol's survey instrument, some of the most severe problems are with Question 3, which is leading and suggestive: "If you were to see a brand of frozen meals in the frozen food section of a supermarket named Smart Balance, would you think it was associated with, licensed by, owned by or in any way connected to Smart Ones? You may answer yes, no, or don't know." As explained in McCARTHY, phasing the key confusion inquiry in the form of a close-ended question such as this is typically improperly leading. McCARTHY, supra at § 32:175. Sabol's format, which somewhat resembles the basic Squirt format (Kaplan Tr. 15:11-16:1), has been repeatedly criticized because, as McCARTHY explains, "it appears to suggest a connection which had never before occurred to the respondent." § 32:172; Kaplan Tr. 17:4-22.

The problem of Question 3 being leading and suggestive is compounded by Sabol's failure to ask an open-ended "why" type question or to use a control. See MCCARTHY, supra at § 32.172 n.9 (lack of a control is particularly problematic with a Squirt-type format); Kaplan Tr. 42:18-45:3. As Dr. Diamond explains, a "consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown." DIAMOND, supra at 256-57. One standard way to address that problem is to ask an open-ended "why" type question to find out whether a yes answer to a Question 3 -- type question is caused by a perceived similarity in the two marks or for some other reason. (Johnson Tr. 43:16-45:13; Kaplan Tr. 38:3-42:14.) Furthermore, "why" questions are sometimes "the most illuminating and probative parts of a survey." MCCARTHY, supra at § 32:178. Yet, Sabol failed to ask any such open-ended questions.

Johnson, on the other hand, followed the accepted practice of asking open-ended questions. He did so to obtain the important "cause" information that cannot be captured by Sabol's close-ended Question 3. (Kaplan Tr. 40:13-42:14.)

E. Did the Survey Include a Control to Correct for "Noise" and to make sure any Confusion is Due to Trademark-Relevant Reasons? No for Heinz; Yes for GFA Brands.

A control group is an additional way to assure that positive responses in a confusion survey are caused by trademark-relevant reasons, and not because of "noise" or other irrelevant reasons. (Kaplan Tr. 20:15; 21:10.) A control group is an additional group of respondents who meet the same screening criteria and go through the same interview as the test group, except they are asked a confusion question about a different brand than the one alleged to infringe. Any confusion observed in the control group can be attributed to irrelevant, non-trademark issues, and that percentage is subtracted from the level of confusion observed in the test cell. J. Jacoby,

Experimental Design and Selection of Controls and Trademark and Deceptive Advertising Surveys, 92 Trademark Reporter 890, 905 (2002).

Because Sabol's study did not have a control group or open-ended questions, it lacked a mechanism to estimate and adjust for error or "noise" in the resulting data. "Noise" in the Sabol study can take many forms, including the interview experience itself, aspects of the questionnaire and guessing by the respondents. Any noise would inflate the level of confusion measured in the test cell. (Sabol Tr. 97:21-99:4.)

Sabol admitted that including a control group would have either reduced the percentage of people his study indicated were confused or kept the number the same. (Sabol Tr. 97:22-99:4.) It appears that Heinz restricted the budget for Sabol's survey to an unusually small sum, which may have influenced Sabol's decision to omit a control. (See Johnson Tr. 39:7-40:8; Sabol Tr. 99:5-1-1:3.)

Regardless of the reasons, Sabol's failure to control for noise or ask an open-ended "why" question yielded affirmative responses to Question 3 that are ambiguous and, therefore, largely meaningless. (Kaplan 42:8-45:3; Johnson 56:19-57:5) See Nat'l Football League Props., Inc. v. Prostyle, Inc. 57 F. Supp. 2d 665, 668-672 (E.D. Wis. 1998) (survey that omitted a control group was excluded).

The Johnson survey, on the other hand, included both an open ended "why" question as well as a properly constructed control group. (Johnson Tr. 35:17-38:4; 43:16-45:13.) Johnson's survey also took the customary steps to make sure respondents knew that a "don't know" answer is a legitimate answer. Experienced survey experts know that respondents are often reluctant to admit that they do not know an answer to a question, for fear of appearing uninformed. It is therefore standard practice to tell respondents that it is acceptable if they do not know the answer

to a question. (Kaplan Tr. 31:18-37:15; Johnson Tr. 32:25-33:22.) It is customary to include a statement, such as Johnson included in his survey, explaining to the respondents that there are no right or wrong answers to the questions and that if they do not know the answer they should simply say so. Sabol, on the other hand, included no such statement.

Sabol's opinion, which surfaced for the first time during his direct trial testimony, that Johnson intentionally designed his survey to obtain "don't know" answers is based entirely on speculation and reveals Sabol's lack of experience with litigation surveys. (Sabol Tr. 70:2-17.) Unlike Sabol, the two experts with extensive litigation experience, Mr. Johnson and Mr. Kaplan, explained that Johnson's survey was done in accordance with accepted methods. Johnson addressed the "don't know" issue exactly the way it always is handled in litigation surveys of this sort. (Kaplan Tr. 31:18-37:15; Johnson Tr. 32:25-33:22.)

F. Other Flaws in the Sabol Survey.

Sabol's survey is riddled with other flaws and deviations from standard practice. For example, Sabol failed to report any attempt to validate the interviews he relied upon for his survey data. In litigation, a survey expert typically attempts to demonstrate that an interviewer actually conducted the interviews, that the interviews were conducted properly and that the respondents were qualified to participate in the study. (Kaplan Tr. 47:21-49:17.) Sabol's report fails to discuss validation at all, calling into question the reliability of his entire study. See Paco Sports, Ltd. v. Paco Rabanne Parfums, 86 F. Supp. 2d 305, 323-24, 54 U.S.P.Q.2d 1205, 1220-1221 (S.D.N.Y. 2000) aff'd. 234 F.3d 1262 (2d Cir. 2000). Sabol conceded that his failure to include any validation in his report was an error. He also claimed he conducted a validation, albeit unreported. (Sabol Tr. 47:19-48:17.) Sabol's validation, however, did not use an independent party, which is not sufficient for a survey used in litigation. (Kaplan Tr. 47:21-49:17.) Johnson, on the other hand, employed a thorough, independent validation process for his

survey. (Johnson Tr. 47:5-49:20.) Unlike Sabol, he also reported the results of his validation in his expert report.

Other flaws in Sabol's survey procedure have been addressed in the trial testimony and reports submitted by Messrs. Kaplan and Johnson. They also addressed in their testimony the other misguided criticisms Sabol had of the Johnson survey.

Although it has been said that there is no such thing as a "perfect" survey, Sabol's survey is so flawed that it should be given little if any weight. Johnson's survey, on the other hand, follows the standard Eveready format for confusion surveys, was conducted with non-leading questions, and with all of the control, validation, double-blind and other safeguards customarily used by survey experts. It was also designed, overseen, and presented by a highly qualified survey expert. The Johnson survey, showing no likelihood of confusion, directly contradicts the results of Sabol's survey, confirms the foregoing analysis of the DuPont factors and should be given considerable weight in the confusion analysis.

III. GFA'S USE OF THE SMART BALANCE TRADEMARK WILL NOT DILUTE THE SMART ONES TRADEMARK.

A. Heinz Has Not Proven the Stringent Standards for a Dilution Claim.

Heinz has not come close to proving its dilution claim. Dilution by blurring occurs when consumers identify a single mark with two different sources. See MCCARTHY, supra at §24:69. For dilution to occur, the relevant public must connect one mark with two *separate* users, rather than mistakenly attribute two similar marks to a single source. MCCARTHY, supra at §24.72. This impairs the distinctiveness of the mark and weakens the ability of the opposer's mark to serve as a "unique identifier." Id.; see also 15 U.S.C. §1125(c)(2)(B). Thus, dilution and likelihood of confusion are based on "inconsistent states of customer perception." MCCARTHY, supra at §24:72 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25, cmt. f (1995)).

When a mark is being diluted, the public "intuitively knows, because of the context of the junior user's use, that there is *no connection* between the owners of the respective marks." Id. (emphasis added).

A claim for dilution requires that the opposer prove (1) opposer's mark is famous; (2) in a proceeding opposing an intent-to-use application, that opposer's mark became famous before the filing date of the application; and (3) applicant's use is likely to cause dilution of the distinctive quality of opposer's mark or lessen the capacity of the mark to identify and distinguish opposer's goods or services. See Toro Co. v. ToroHead Inc., 61 U.S.P.Q.2d 1164, 1172-1173 (T.T.A.B. 2001); Polaris Indus. Inc. v. DC Comics, 59 U.S.P.Q.2d 1798, 1800 (T.T.A.B. 2000). Heinz has not proven that its mark was famous before GFA Brands filed its intent-to-use applications in 2009, because virtually all of its evidence post-dates 2009. Similarly, Heinz cannot prove that its mark would be diluted by adding one more SMART-branded food product to the plethora of SMART-branded food products already present in the marketplace. The "Smart" portion of Heinz's SMART ONES mark had been rendered weak and descriptive of healthy eating choices by the proliferation of the term "Smart" in food product brands. Heinz's claim for dilution should be denied.

B. Opposers have not shown that the SMART ONES mark met the high dilution fame standard before the filing date of GFA Brands' intent-to-use applications.

The bar for establishing fame under a dilution analysis is set extremely high. See Toro Co., 61 U.S.P.Q.2d at 1170; Coach Servs., Inc., 101 U.S.P.Q.2d at 1724, (citing 4 McCARTHY § 24:104 (4th ed. 2011)). Unlike fame under a likelihood of confusion analysis, which can vary along a spectrum from very strong to very weak, a mark is either famous or it is not famous for the purposes of dilution, see Coach Servs., Inc., 101 U.S.P.Q.2d at 1720. Dilution fame requires a showing that when the general public encounters in the plaintiff's mark "in almost any context"

it initially associates the term with the Opposer. See Toro Co., 61 U.S.P.Q.2d at 1181. The Opposer's marks must have become "household terms [with] which almost everyone is familiar." Id. To prove that its mark is famous, the opposer must essentially "demonstrate that the English language has changed," and that its mark has become part of the vernacular. Id. at 1180.

A mark is defined under § 1125(c)(2)(A) as "famous" for dilution purposes if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the Board may consider all relevant factors, including: (1) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties, (2) the amount, volume, and geographic extent of sales of goods or services offered under the mark, (3) the extent of actual recognition of the mark, and (4) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register. However, evidence showing the transformation of a term into a truly famous mark may include recognition by the other party, intense media attention, and surveys. See Toro Co., 61 U.S.P.Q.2d at 1181.

The quantum of evidence required to prove that a mark has reached "dilution fame" is extraordinary. Examples of well-known marks that have *not* met the dilution fame requirement include the TORO mark for professional lawn care equipment;[2] the IN-N-OUT BURGER mark for fast food service;[3] the BEGGIN' STRIPS mark for dog treats;[4] and the COACH mark for luxury products including women's handbags.[5]

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[2] See Toro Co., 61 U.S.P.Q.2dat 1181 (evidence of sales and advertising did not show that the public associated the term "Toro" with the Torro Co. in "every context.")

[3] IN-N-OUT Burgers v. Fast Lane Car Wash & Lube, Opposition No. 91183888, 2013 WL 3188897 (T.T.A.B. Mar. 14, 2013) (nonprecedential).

The quantity and quality of evidence needed to establish fame under a dilution analysis is reflected in the evidence introduced in NASDAQ Stock Mkt. Inc. v. Antartica S.r.l., 69 U.S.P.Q.2d 1718 (T.T.A.B. 2003). In that case, the Board found that the NASDAQ mark had achieved dilution fame because the record included market studies showing that awareness of the NASDAQ stock market jumped from about 20% in 1990 to more than 80% in 1999, the NASDAQ website received seven million daily views, its daily market results appeared in hundreds of newspapers, broadcasting stations and websites, and its NASDAQ-listed companies received separate and significant media coverage as NASDAQ traded companies. Id. at 1729; see 7-Eleven, Inc. v. Wechsler, 83 U.S.P.Q.2d 1715, 1727-1728 (T.T.A.B. 2007) (citing NASDAQ as an example of the extraordinary amount and quality of evidence required to show dilution fame); see also Virgin Enters. Ltd. v. Moore, 2012 WL 03992908 (T.T.A.B. 2012) (nonprecedential) (same). In 7-Eleven, Inc. v. Wechsler, the Board, citing NASDAQ, found that the BIG GULP mark had achieved the very high standard for dilution fame through extensive media attention, particularly those references identifying the mark as a symbol of American culture such as an article entitled "The Big Gulp is a symbol of American haste and greed," and a 73% unaided awareness among all consumers, including non-users of the opposer's services. See 83 U.S.P.Q.2d 1715, 1727(T.T.A.B. 2007). In Research in Motion Ltd. v. Defining Presence Mktg. Grp., Inc., the Board found that the BLACKBERRY mark for smartphones was famous because of the "ground breaking role of this device in shaping the culture and technology of the early twenty-first century, the incredible volume of sales, opposer's extensive promotion and advertising expenditures within the United States, and evidence of widespread media attention."

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[4] Societe Des Produits Nestle S.A. v. Midwestern Pet Foods, Inc., 2011 WL 1495460 (T.T.A.B. 2011) (nonprecedential) aff'd 685 F.3d 1046 (Fed. Cir. 2012).

[5] Coach Servs. Inc. v. Triumph Learning LLC, 96 U.S.P.Q.2d 1600 (T.T.A.B. 2010); aff'd 668 F.3d 1356 (Fed. Cir. 2012).

See 102 U.S.P.Q.2d 1187, 1197 (T.T.A.B. 2012). The Board also found that BLACKBERRY has surmounted the dilution fame requirement because before the Applicants' intent-to-use applications were filed, BLACKBERRY branded goods had "kicked-off a technology revolution in the United States." Id.

In contrast to the extraordinary level of evidence of fame found sufficient in NASDAQ, 7-Eleven, and Research in Motion, Heinz has provided no evidence of media attention, no evidence that GFA has admitted the SMART ONES mark is famous for dilution purposes, and no survey evidence addressing the proper time frame. In fact, Heinz has produced only one piece of relevant evidence that pre-dates the filing date of GFA Brands' intent-to-use applications. Heinz's evidence falls far short of meeting the high standard for dilution fame.

Heinz was required to prove that its mark became famous *before* the filing date of GFA Brands' intent-to-use applications. See Toro Co., 61 U.S.P.Q.2d at 1173. GFA Brands filed intent-to-use applications serial nos. 77/864,305 and 77/864,268 on November 3, 2009. Therefore, all evidence that Heinz supplied from after November 3, 2009 is inapplicable to the Board's determination of the mark's famous character. See, e.g. Coach Servs. Inc., 101 U.S.P.Q.2d at 1725 (opposer's advertising figures, unsolicited media mentions, and survey data that post-date Applicant's intent-to-use application did not evidence dilution fame).

For example, Henz's allegations that recognition of the SMART ONES brand is high and that the brand has a strong reputation are based on testimony of the deponents' present awareness of the brand when they were deposed in 2013, and based on two articles from 2013. (Opp'rs. Br. at p. 12 (citing Gray Conf. Tr. 69:22-25, 24:11-14, and Hudson Tr. 17:11-21, 79:6-81:18 and Ex. 35.)) Even if they were directed toward the proper time frame, "[f]ame for FTDA purposes cannot be shown with general advertising and sales figures and unsupported assertions of fame

by the party." Toro Co., 61 U.S.P.Q.2d at 1179. Similarly, the brand awareness study Heinz cites was conducted in 2010, making it in applicable to the dilution fame analysis. (Opp'rs Br. at p. 38 (citing Gray Conf. Tr. Ex. 46)). That aside, the study found 53% unaided awareness for SMART ONES entrees, only 6% unaided awareness for breakfast items, and only 6% unaided awareness for desert items -- which are far below the 80% and 73% awareness in NASDAQ and 7-Eleven. (Opp. Br. pp. 12-13 (citing Gray Conf. Tr. 63:21-65:9 and Ex. 46)) Heinz's survey expert, Barry Sabol, conducted a study that also post-dated November, 2009 and did not assess unaided awareness at all. (Sabol. Tr. Ex. 1.) The other evidence that Heinz cites in its attempt to prove fame is related to visits to the SMART ONES website was from fiscal years 2010 and 2011 -- again, after GFA Brands' applications were filed. (Gray Conf. Tr. Ex. 44.)

Heinz's argument that GFA has admitted that the SMART ONES brand is famous is not true. While GFA Brands' in-house counsel Timothy Kraft said that 75% or greater awareness would indicate as strong brand (Opp. Br. at p. 13), Heinz's survey showed that the SMART ONES brand achieved only 53%, 6%, and 6% unaided awareness in 2010. Although Mr. Kraft also stated that, he believed the SMART ONES brand was "well-known" (Opp. Br. at p. 13), that is not even close to stating that SMART ONES has reached the level of fame for dilution. Finally, Heinz's allegation that GFA Brands' Chief Marketing Officer stated that the SMART ONES brand is a "market dominator" was made in 2010, again after GFA's intent-to-use applications were filed. (Opp. Br. p. 13, Hooper Tr. Ex. 52.)

In fact, the *only* piece of evidence that Heinz has referred to in its trial brief that pre-dates the filing of GFA Brands' intent-to-use applications is a single exhibit that sets forth the number of physical containers of SMART ONES products shipped in 2008 and 2009. (Opp. Br. p. 15, Gray Tr. Ex. 45.) Even if this single piece of evidence were sufficient to show that SMART

ONES is a top selling brand, "[m]erely providing evidence that a mark is a top-selling brand is insufficient to show this general fame without evidence of how many persons are purchasers." See Coach Servs. Inc., 101 U.S.P.Q.2d at 1729 (quoting Toro Co., 61 U.S.P.Q.2d at 1181). Heinz has provided no evidence of how many people purchased SMART ONES products before GFA Brands filed its applications -- merely how many units were shipped.

C. GFA Brands' SMART BALANCE mark is not likely to dilute the distinctiveness of the SMART ONES mark when it is applied to frozen food products.

There are six, non-exclusive statutory factors for determining the likelihood of blurring in a dilution case: (1) the degree of similarity between the mark or trade name and the famous mark, (2) the degree of inherent or acquired distinctiveness of the famous mark; (3) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (4) the degree of recognition of the famous mark; (5) whether the user of the mark or trade name intended to create an association with the famous mark; and (6) any actual association between the mark or trade name and the famous mark. 15 U.S.C. § 1125(c)(2)(B). In its brief, Heinz has already conceded that there is nothing in the record suggesting that GFA Brands intended to create an association between the SMART BALANCE and SMART ONES marks. (Opp. Br. p. 40.) Each remaining factor is addressed in turn:

1. The degree of similarity between the mark or trade name and the famous mark.

For this factor to favor Heinz, it must prove that the SMART ONES mark and the SMART BALANCE mark are "highly similar." See Research in Motion, Ltd.,102 U.S.P.Q.2d at 1197. While the dilution similarity analysis is not strictly the same as a likelihood of confusion analysis for similarity, the Board still considers the degree of similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. See

id., (citations omitted). As GFA Brands has shown in its likelihood of confusion analysis of these factors (App. Br. p. 20-31 above), the SMART ONES mark and the SMART BALANCE mark are not "highly similar." As GFA Brands has already shown, the terms ONES and BALANCE have individual trademark and market significance, the term SMART is laudatory and used extensively by third parties, which has rendered the term deserving of less weight in the trademark analysis, and the two marks provide consumers with different impressions -- the SMART BALANCE mark suggests a balance of ingredients, while the SMART ONES mark suggests that the consumer made a correct food selection.

2. The degree of inherent or acquired distinctiveness of the famous mark.

Opposers' entire argument that its mark is distinctive rests on its registration on the Principal Register without a Section 2(f) claim. (Opp. Br. pp. 38, 40.) While the type of registration is one factor the Board considers in assessing distinctiveness, an overall distinctiveness analysis is made "even when it is undisputed that opposer's mark is registered on the Principal Register." Citigroup Inc. v. Capital City Bank Grp. 94 U.S.P.Q.2d 1645 (T.T.A.B. 2010) (citing NASDAQ StockMarket Inc. v. Antartica S.r.l., 69 U.S.P.Q.2d 1718, 1735 (T.T.A.B. 2003)); Toro Co., 61 U.S.P.Q.2d at 1176. In addition to a mark's registration, the Board considers other factors that show the mark is weak, such as other uses of the term by third parties. See Nike Inc., 100 U.S.P.Q.2d at 1028. Heinz has argued in a separate portion of its brief that the record is "totally devoid" of evidence showing third party use of "SMART-formative marks in connection with similar products." (Opp. Br. at 25.) However, GFA Brands has provided a great deal of evidence that the term "Smart" is consistently used in relation to food products, and has acquired a descriptive meaning connoting a healthy eating choice. (App. Br. pp. 9-19) (showing extensive third party use through tables of third party registrations,

product packaging bearing the term "Smart," websites, and cookbooks incorporating the word "Smart," showing that third party use of the term "Smart" on consumer packaged goods precludes the term from having a source indicating trademark strength, and explaining that the "Smart" portion of the SMART ONES mark is laudatory and descriptive.))

That the word "smart" has become a descriptive term in the marketplace for healthy eating choices is further evidenced by the change in GFA Brands' own enforcement strategy. Timothy Kraft testified that GFA Brands no longer polices every trademark containing the word "Smart" related to food products because "the marketplace is seeing this rampant proliferation of the use of 'Smart' marks, our strategy has had to evolve ... in today's marketplace, we don't think it's as practical to try to police every use of the word 'Smart.'" (Kraft Tr. 9:1:3.) Simply put, the proliferation of the word "Smart" in the food industry has rendered it a descriptive term for healthy eating choices.

3. The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.

As GFA Brands has explained above, Heinz is only one of a vast number of users of the term "Smart" to connote healthy eating choices in the food industry. Because the term "Smart" has proliferated in the food industry by appearing on "healthy" food product names other items related to healthy eating choices -- including SMART BALANCE branded products – Heinz's SMART ONES mark has already been diluted. See Citigroup, Inc. v. Capital City Bank Group, Inc., 94 U.S.P.Q.2d 1645 (T.T.A.B. 2009)("the term 'City Bank' frequently has been adopted and used by third parties. In essence, to the extent that opposer is correct in arguing that the mere use of the words 'City Bank' in another mark would dilute opposer's mark, such mark has already been diluted and the registration of applicant's marks is not likely to cause additional

blurring of CITIBANK.") Adding one more SMART BALANCE product into the mix of SMART-branded food products will not dilute the SMART ONES mark further.

4. The degree of recognition of the famous mark.

If a mark has been determined to be famous "as a prerequisite for dilution protection," this factor requires the Board to apply a sliding scale to determine the extent of that protection. See Citigroup, Inc., 94 U.S.P.Q.2d at 1668. Because Heinz has not provided sufficient evidence to show that its mark was famous before GFA Brands filed its intent-to-use applications in November, 2009, Heinz has not met the prerequisite for consideration of this factor. Accordingly, because the SMART ONES mark does not meet the dilution fame requirement, this factor also favors GFA Brands.

5. Any actual association between the mark or trade name and the famous mark.

This final factor also favors GFA Brands. Despite being marketed in the same stores, through the same channels of trade, and appearing in the very same stores, neither party is aware of any instances of actual consumer confusion between the SMART BALANCE mark and the SMART ONES mark -- or for that matter, *any other* product bearing the word "Smart," including confusion between SMART BALANCE and SMART POP! unpopped popcorn and SMART BALANCE and SIMPLY SMART branded milk. (Kraft Tr. 15:2:6; 29:12-30:2)

Furthermore, after GFA Brands' survey expert, Philip Johnson, concluded on the basis of his Eveready format survey that there is "no likelihood of confusion whatsoever about the use of the Smart Balance name as a name for frozen meal entrees that are sold in a supermarket or other places that sell frozen foods." (Johnson Tr. 6:5-9 and Ex. 2; see also Johnson Tr. 55:2:20.) Mr. Johnson holds that opinion with certainty. (Id.) Thus, this factor, like the other five factors,

favors GFA Brands. Heinz's trademark dilution arguments fail on all elements of this final prong of the dilution test.

CONCLUSION

For the foregoing reasons, GFA Brands respectfully submits that Heinz has failed to carry its burden of proving a likelihood of confusion and dilution. The opposition should be dismissed with prejudice.

Dated this 16th day of September, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Applicant's Trial Brief was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via e-mail, on this 16th day of September, 2013, to Counsel for the Opposers listed below.

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